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Nos. 95-346 and 95-345

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

GUY JEROME URSERY,

Respondent.

&

UNITED STATES OF AMERICA,

Petitioner,

v.

FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth And Ninth Circuits

BRIEF OF THE THIRTY-NINE COUNTIES OF THE STATE OF WASHINGTON* AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Virtually every state has authorized civil forfeitures and penalties to help combat the growing problem of crimes motivated by greed. These civil remedies are intended to remove the incentive for drug dealers, money launderers, perpetrators of securities fraud, and other organized criminals to engage in their illicit trades. Unlike the street corner crack dealer, major drug dealers are motivated by greed, not by their own addictions. They live, usually very well, off the weaknesses, the ignorance, the youth, the misfortunes of others.[1]

Before legislatures authorized civil forfeitures, these criminals would "do their time," then retire on their spoils, or use them to finance their re-entry into their illegal businesses. Forfeitures were intended to remove the economic power base of these criminals, and to hit them where it would hurt most: in their pocketbooks.[2]

Washington, like many states, applies federal double jeopardy interpretation to its state constitution's double jeopardy provision. *State v. Gocken*, 127 Wash. 2d 95, 107, ___ P.2d ___ (1995) (holding that Washington's double

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[1] One of the cases below, *United States v. $405,089.23 in United States Currency*, No. 95-346, 33 F.3d 1210, 1214 (9th Cir. 1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995) shows just how well these dealers live. There, the government sought to forfeit, as proceeds of drug trafficking and money laundering, over $500,000, 138 silver bars, a helicopter, two boats, a plane and eleven cars.

[2] *See e.g.*, Omnibus Drug Act, Ch. 271 § 211, 1989 Wash. Laws 905.

jeopardy clause is "given the same interpretation the Supreme Court gives to the Fifth Amendment.")

This Court's opinions relating to double jeopardy in *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 113 S.Ct. 2801 (1993), and *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994), have confused the lower courts about double jeopardy in the context of parallel civil and criminal actions. The result is chaos.[3]

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[3] For example, some courts apply *Halper*'s rational relation test and find that double jeopardy does not bar a second punishment. *See e.g., SEC v. O'Hagan*, ___ F. Supp. ___, 1995 WL 605986 (D. Minn. Aug. 8, 1995) (*Halper*, not *Austin*, determines whether forfeiture is remedial or punitive); *Ragin v. United States*, 893 F. Supp. 570 (W.D.N.C. 1995) (forfeiture of drug proceeds is not punishment because it is remedial under *Halper* and because defendant was never legally entitled to the property); *United States v. Ogbuehi*, 897 F. Supp. 887 (E.D. Pa. 1995) (forfeiture of $96,000 worth of property was rationally related, under *Halper*, to costs to government and society resulting from defendant's heroin distribution); *United States v. Box*, ___ F. Supp. ___, 1995 WL 617477 (N. D. Ill Oct. 10, 1995) (applying *Halper* rational relation test). Some, like the courts below, say or imply that *Austin* effectively overruled *Halper*, and find that double jeopardy bars a second sanction, regardless of its remedial nature. *See also United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado, et al.*, 1996 WL 49002 (10th Cir. Feb. 5, 1996)

Some courts have concluded that crimes and related civil forfeitures are almost always the same offense. *See, 9844 South Titan Court, supra. United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *United States v. Perez*, 70 F.3d 345 (5th Cir. 1995), *Oakes v. United States*, 872 F. Supp. 817 (E.D. Wash. 1994). Others say that they are never the same offense. *See, United States v. Falkowski*, ___ F. Supp. ___, 1995 WL 568524 (D. Alaska Sept. 25, 1995).

Washington courts rely on this Court for federal constitutional interpretation, and understandably are reluctant to decide double jeopardy issues in forfeiture cases before this Court has ruled on them. Although the Washington Supreme Court recently held that forfeiture of proceeds of drug sales is not punishment, the divided court deferred consideration of whether or not forfeiture of property used to facilitate a crime is or can be the same offense as the crime. *State v. Cole*, 128 Wash. 2d 262, ___ P.2d ___ (1995), motion for reconsideration pending.

Unlike the federal government, many states, including Washington, have no criminal forfeiture provisions. Forfeitures are civil administrative or judicial proceedings conducted parallel to a criminal prosecution. Therefore this Court's decisions in the cases at bar will fundamentally affect how the states use civil forfeiture laws, and what kinds of laws legislatures will enact in the future.

Prosecutors and law enforcement agencies thus have a strong interest in how this Court decides whether and how double jeopardy applies to parallel civil and criminal proceedings. They want to be able to use the tools provided by their legislatures to remove the incentives for organized or extremely profitable criminal activity, and they want to do so in a way that does not infringe on fundamental rights.

SUMMARY OF ARGUMENT[4]

In 1965 the "fictions and rationalizations" that complicated double jeopardy law were described as the "characteristic signs of doctrinal senility." Note, *Twice In Jeopardy*, 75 Yale L.J. 262, 264 (1965). Because of the confusion caused by *Halper*, *Austin*, and *Kurth Ranch*, the "fictions and rationalizations" have multiplied exponentially, and "doctrinal senility" is no longer just an amusing description of disarray. It has arrived, like senility, erasing the memory of what double jeopardy was meant to be.

The Double Jeopardy Clause of the Fifth Amendment provides, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The lower federal courts and the state courts are deeply divided on what constitutes the same offense, what constitutes jeopardy, and other aspects of current double jeopardy analysis that arose only after *Halper*, *Austin*, and *Kurth Ranch*.[5]

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[4] Portions of this brief were adapted from Barbara A. Mack, *Double Jeopardy: Civil Forfeiture and Criminal Punishment – Who Determines What Punishments Fit The Crime?*, 19 Seattle U. L. Rev. (forthcoming April, 1996).

[5] For example, one of the questions before this court is whether the parallel civil and criminal proceedings in the courts below constituted, in each case, a single proceeding for purposes of double jeopardy analysis. Before *Halper* this question would not have arisen.

Halper quoted *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) to say that cumulative punishment authorized by Congress is permissible in a single trial. But *Hunter* was a single trial case, and two proceedings were not an issue. *Halper's* use of the

Justice Frankfurter anticipated this predicament in his thoughtful concurring opinion in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). He recognized that a court's judgment whether civil penalties and forfeitures are punitive or remedial would be speculative. *Id.* at 554. He said that double jeopardy does not prevent Congress from authorizing comprehensive penalties, prescribed in advance, to be enforced in separate proceedings, and that such actions were common at the time the Fifth Amendment was ratified. *Id.* at 555-56.

If double jeopardy was not meant to bar multiple punishments that were authorized by Congress, how can citizens be protected from oppression by multiple or excessive punishments? Justice Frankfurter relied on the Eighth Amendment. *Id.* at 556.

As Justice Frankfurter observed, a careful examination of the historical background and legal development of double jeopardy leads to the conclusion that double jeopardy was never meant to restrict the authority of Congress or legislatures to determine what punishments to impose for particular conduct. This Court's jurisprudence, from *Ex Parte Lange*, 85 U.S. (Wall) 163 in 1874 until *Halper* in 1989, consistently gave great deference to legislative intent in the realm of punishments.

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quotation expanded its meaning, and after *Halper*, lower courts have gone much further. *See e.g., United States v. Millan*, 2 F.3d 17 (2d Cir. 1993). Yet there is no analysis or holding by this Court that supports the concept that cumulative punishments are permissible *only* in a single proceeding. *Halper's* use of this phrase has also led courts to confuse the multiple prosecution and multiple punishment prongs of double jeopardy analysis. *See e.g., 9844 South Titan Court, supra.*

This Court should adopt Justice Frankfurter's reasoning. The Double Jeopardy Clause is too blunt an instrument to deal with these cases, and the multiple punishments prong of double jeopardy law is not grounded in the history of the Fifth Amendment or in the cases it supposedly arises from. Instead the Court should employ the more direct and precise Eighth Amendment to curb government overreaching. This will protect criminal defendants and civil claimants without trammeling the well-recognized right of the legislature to determine what, and how many punishments fit a particular crime.

ARGUMENT

I. DOUBLE JEOPARDY WAS NEVER MEANT TO LIMIT THE AUTHORITY OF THE LEGISLATURE TO DETERMINE PUNISHMENT, INCLUDING MULTIPLE PUNISHMENTS.

A. Nothing In English Common Law, Colonial History, Or Development Of The Fifth Amendment Indicates That Double Jeopardy Was Intended To Limit The Authority Of Legislatures To Determine Punishment.

The statutory roots of double jeopardy are unclear. Neither the Magna Carta nor the English Bill of Rights of 1689 mentions double jeopardy protection, although both contain many other antecedents of our Constitution.[6]

[6] These antecedents include: the right to petition, free election of members of parliament, the consent of parliament to raise or keep an army in time of peace, free speech within parliament, parliamentary consent to levy taxes, and that "excessive bail ought not to be required, nor cruel and unusual punishments imposed." Robert S. Peck, *The Bill of Rights and the Politics of Interpretation*, 116 (1992), quoting 1 *The Bill of Rights* 4 (B. Schwartz ed. 1971) and App. B English Bill of Rights (1989).

In the seventeenth and eighteenth centuries Lords Coke and Blackstone clarified double jeopardy in their works describing the common law of England. The common law included the pleas in bar of *autrefois convict* and *autrefois acquit*, which barred a second trial after a verdict. *See* 75 Yale L.J. at 262, n.1. The word "jeopardy," which first appeared in Blackstone, only applied to prior verdicts of guilt or acquittal. Jay A. Sigler, *Double Jeopardy; The Development of A Legal And Social Policy* 20 (1969). Most criminal penalties then were capital, hence the term "jeopardy of life."[7] By the eighteenth century double jeopardy applied primarily to capital crimes. *Sigler, supra* at 4-5.

The colony of Massachusetts first codified double jeopardy, applying it not only to all kinds of criminal cases, but to civil cases as well. *Sigler, supra* at 21. Other colonies adopted Massachusetts' version of the doctrine, but broad double jeopardy protection was short-lived. *Id.* at 22. After the American Revolution, most states did not incorporate double jeopardy into their constitutions. *Id.* at 23. New Hampshire was the first state to adopt a Bill of Rights that included double jeopardy: "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." *Id.* (quoting N.H. Const. of 1784, art. I, § XVI,

[7] "Life or limb" may derive from an earlier period when punishments of maiming and mutilation were common, before double jeopardy became largely limited to capital crimes. *Sigler, supra*, at 5.

reprinted in Perry and Cooper, *Sources of Our Liberties*, 384 (1959)). New Hampshire's protection, limited to former acquittals, was considerably narrower than that afforded by colonial Massachusetts.

The framers of the Constitution enacted the Bill of Rights in a mere three months, and there was little reported debate about the double jeopardy clause. *See* 1 *Annals of Congress* (Joseph Gales, ed., 1834), and *Documentary History of the First Federal Congress 1789-1791*, Vol. 1, Linda Grant Depauw, ed., 1972, Vol. 4, Charlene Bangs Bickford and Helen E. Veit, eds., 1986.

James Madison's original proposed double jeopardy language said "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 *Annals of Congress* at 434, 753. The Senate changed Madison's language to "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." 4 *Documentary History of the First Federal Congress, supra* at 46.

The early development of the concept of double jeopardy and its codification in the Fifth Amendment do not tell us precisely what evil it was meant to protect against: whether it was meant to limit the discretion of prosecutors, of judges, of the legislature, or of all of them. In early England, when the common law was developing everyone represented the crown, so English common law does not help us discern the intent of the framers of our Constitution. We must look to our own case law for answers.

B. *Ex Parte Lange*, Cited As The Genesis Of The Multiple Punishments Prong Of Double Jeopardy Analysis, Holds Only That A Judge May Not Impose A Sentence Beyond That Authorized By The Legislature.

Ex Parte Lange, 85 U.S. (Wall) 163 (1874) is universally cited as the case that first defined the multiple punishments prong of double jeopardy analysis. But *Lange* does not stand for that proposition. In *Lange* the defendant was convicted of stealing U.S. mail bags. The law authorized a fine or imprisonment, but not both. Nevertheless the judge imposed a prison sentence and a two hundred dollar fine. Lange went to jail and paid the fine. Shortly thereafter the court vacated the sentence and imposed a new sentence, this time for prison alone.

The Supreme Court held that vacating the judgment and imposing a different sentence constituted two punishments for the same offense, because once the defendant "had fully suffered one of the alternative punishments to which the law alone subjected him, the power of the court to punish further was gone." *Id.* at 176.

Implicit in *Lange* is the only unifying thread in double jeopardy analysis from 1874 until today: the double jeopardy clause does not restrict the legislature's ability to decide how many and what punishments fit the crime. The *Lange* opinion stands only for the proposition that the trial court may not exceed the punishment authorized by the legislature. The trial court's sentence was illegal. Had Congress authorized both a fine and prison, there would have been no issue for the Court to decide. Deference to

legislative intent became a fundamental part of twentieth century double jeopardy analysis. *See, Albernaz v. United States*, 450 U.S. 33 (1981); *United States v. Whalen*, 445 U.S. 684 (1981); *Missouri v. Hunter*, 459 U.S. 359 (1983).

Unfortunately *Lange* contains an oft-quoted dictum that is cited as the basis for the double punishment prong of double jeopardy analysis: "If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense." *Lange, supra* at 168. To support this broad statement the Court cited only cases that related to second prosecutions after a conviction or acquittal: multiple prosecution, not multiple punishment cases. *See, e.g., Cooper v. State*, 13 N.J. (1 Green) 361 (1833), *Com. v. Olds*, 15 Ky. (5 Litt.) 137 (1824), *Crenshaw v. Tenn.*, 8 Tenn. (1 Mart. & Yer.) 122 (1827), cited in *Lange* at 170-172. In fact it was not the Fifth Amendment, but the common law that served as a basis for the *Lange* Court's interpretation of the Double Jeopardy Clause: "It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection." *Lange* at 170.

Since the common law at the time the Constitution was adopted limited double jeopardy to pleas in bar of *autrefois acquit, autrefois convict, former pardon,* and *autrefois attaint,*[8] no common law double jeopardy analysis cited by the Court supported its broad dictum. The

[8] *Former pardon* and *autrefois attaint* are obsolete pleas not applicable to our criminal procedure. *See,* Note, *Twice in Jeopardy,* 75 Yale L.J. 262, n.1 (1965). *Autrefois acquit* and *autrefois convict* only apply to multiple prosecutions.

Court's decision really was based on due process, so the Court needed no common law basis for its decision. *See, Kurth Ranch, supra,* at 1956, Scalia, J. dissenting.

Lange was not a unanimous opinion. In his dissenting opinion Justice Clifford emphasized that the Double Jeopardy Clause was only meant to apply to multiple prosecutions. *Lange, supra* at 201. The disagreement in 1874 frames the question before this Court today: Was double jeopardy ever meant to protect against multiple punishments? Even the *Lange* majority believed Congress could impose multiple punishments.

Twenty-two years after *Lange*, the Court directly contradicted its dictum. In *United States v. Ball*, 163 U.S. 662, 669 (1896), a double prosecution case, the Court said of the Double Jeopardy Clause "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."[9]

Lange held only that a judge cannot impose more punishment than the legislature authorized. It does not stand for the proposition that Double Jeopardy bars the legislature from authorizing multiple punishments.

[9] The *Ball* case is infrequently cited, and where it is, it is cited with *Lange* in support of three-pronged double jeopardy analysis. (*See e.g., North Carolina v. Pearce*, 395 U.S. 711, 717, nn. 9, 10, 11 (1969)).

C. Between 1789 and 1989 Congress Has Authorized And The Judiciary Has Upheld Multiple Punishments And Penalties For The Same Offense When Intended By Congress.

Our early forfeiture laws, based on the common law, provided for seizure and forfeiture *in rem* of ships for customs and revenues violations, piracy, and slave trading, partly because foreign owners were frequently out of reach of our courts. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974), and Oliver Wendell Holmes, Jr., *The Common Law* 28 (Little, Brown & Co. 1923) (1981). Many of these laws provided for parallel criminal prosecution and civil forfeitures.[10]

Between the late nineteenth century and today double jeopardy has arisen in the context of parallel civil and criminal proceedings because Congress and legislatures, as they have since the beginning of the republic, have

[10] For example, the Act of Aug. 4, 1790, Chap. 35 § 60, 1 Stat. 174 provided that if goods, entered for exportation, with intent to draw back the duties, were landed in the United States, the goods and the vessels they were in were forfeitable to the government, and all persons involved subject to criminal prosecution. The Act of May 10, 1800, Chap. 51 § 1-4, 2 Stat. 70-71. provided that any person with an interest in a ship used to transport slaves would forfeit twice the value of his interest in the ship and double the value of any slave which may at any time have been transported in the vessel; and any person serving on such a vessel could be criminally convicted. The Act of Mar. 2, 1807, Chap. 22 §§ 1-10, 2 Stat. 426-30 provided for forfeiture of any vessel fitted out for the slave trade, or used to transport slaves, and for criminal punishment of those involved in the slave trade of up to ten years in prison and a $10,000 fine.

passed additional laws designed to reimburse the government for the costs of criminal activity and to discourage particular kinds of conduct.

1. The Court Has Upheld The Legislature's Power To Authorize Multiple Punishments In Criminal Cases For The Same Offense.

In the 1980's the Court examined congressional intent and the multiple punishments prong of double jeopardy analysis in purely criminal cases. In these cases the Court held unequivocally that double jeopardy does not limit the power of Congress and legislatures to impose multiple punishments for the same criminal activity. Therefore in *Albernaz v. United States*, 450 U.S. 333 (1981), where the defendants were convicted of conspiracy to distribute and of conspiracy to import marijuana, double jeopardy did not bar consecutive sentences because

> "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed . . . [and] Congress intended . . . to impose multiple punishments."

Id. at 344.

In *United States v. Whalen*, 445 U.S. 684 (1980), a case with four written opinions, all of the opinions agreed that the double jeopardy decision hinged on legislative intent. The majority opinion held that double jeopardy barred the imposition of consecutive sentences for rape and felony murder based on the same offense, because Congress had not intended to impose multiple punishments for

those offenses. *Id.* at 689. Justice White, concurring, said that the case could have been decided strictly based on statutory construction, not constitutional interpretation. *Id.* at 696. "Had Congress authorized cumulative punishments, . . . imposition of such sentences would not violate the Constitution." *Id.* Justice Blackmun, also concurring, said that "[t]he *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended. It serves, in my considered view, nothing more." *Id.* at 697. Justice Blackmun went on to say that dicta in other cases indicating otherwise had led to confusion among state courts that "have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishments" and such dicta should be squarely repudiated. *Id.* at 698.

Justice Rehnquist, dissenting in *Whalen*, also commented on the confusion in the realm of double jeopardy and said that "our opinions, . . . are replete with mea culpa's occasioned by shifts in assumptions and emphasis." *Id.* at 699. Justice Rehnquist concluded that double jeopardy was not implicated, that the decision should rest on statutory interpretation, and that the Court should have deferred to the lower court's analysis of whether consecutive sentences were intended. *Id.* at 705-714.

In *Missouri v. Hunter*, 459 U.S. 359 (1983) the Missouri Supreme Court held that consecutive sentences for armed criminal action and robbery convictions constituted multiple punishments for the same offense, and therefore

were barred by double jeopardy. Previously the Missouri Supreme Court had issued a challenge to the Supreme Court:

> Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments of the same offense arising out of a single transaction.

Id. at 365, quoting *State v. Haggard*, 619 S.W.2d 44, 51 (Mo. 1981). In *Hunter*, the Supreme Court responded "unequivocally," that "where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end. . . . " *Hunter, supra* at 368-69. The Court held, as originally implied in *Lange*, that double jeopardy "does no more" than prevent the sentencing court from imposing greater punishment than the legislature intended. *Id.* at 366. These cases can only mean that Double Jeopardy does not prevent Congress from authorizing multiple punishments, even for the same offense.

2. Until *Halper* The Court Deferred To Congressional Intent To Impose Civil Penalties In Addition To Criminal Punishment.

Prohibition and related tax laws in the 1920's and 1930's spawned a vast increase in double jeopardy cases,

magnifying the confusion surrounding double jeopardy and the punishment issue. The Court decided two cases on the same day in 1931 that reflect that confusion, and that may have later concerned the Court because of their seemingly inconsistent results. Perhaps as a result of such concern, in parallel civil and criminal cases the Court began consistently to use a statutory construction approach to double jeopardy analyzing congressional intent, and asking whether the purpose and effect of the civil sanction were remedial.

The two cases decided on the same day in 1931 were *United States v. LaFranca*, 282 U.S. 568 (1931) and *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931). In *LaFranca*, an *in personam* action to recover liquor taxes and penalties, the Court concluded that "an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action." 282 U.S. at 575. The *LaFranca* Court relied on cases that either provided no authority for their own opinions, were cited out of context, or were irrelevant. *See e.g., United States v. Chouteau*, 102 U.S. 603 (1881).

Although the *LaFranca* Court never mentioned double jeopardy it did a double jeopardy analysis, concluding that its result was necessary to avoid "doubts" about the constitutionality of the civil penalty statute. 282 U.S. at 576.

In *Various Items* the government sued *in rem* to forfeit a distillery, warehouse, and a denaturing plant because the corporation conducted its business with intent to

defraud the government of taxes. The corporation and others had been convicted of conspiring to violate the statute based on the same transactions. 282 U.S. at 578-579. The Court found that double jeopardy did not bar the civil forfeiture because it was *in rem*, and that the forfeiture was not part of the punishment for the criminal offense. *Id.* at 581.

The difference between the Court's analyses in *LaFranca* and *Various Items* is that one was an *in rem* forfeiture and one was an *in personam* tax penalty. The Court never addressed whether either person was punished or prosecuted twice for the same offense. The Court could have followed the approach suggested in 1926 by Justice Holmes in *Murphy v. United States*, 272 U.S. 630 (1926), which analyzed whether the purpose of a penalty was punitive or remedial, and concluded that double jeopardy did not bar a remedial civil penalty after an acquittal.

The Court later returned to Justice Holmes' analysis. In *Helvering v. Mitchell*, 303 U.S. 391, 404 (1938) a taxpayer who had been acquitted of income tax evasion was assessed a fifty percent tax penalty. The Court deferred to Congress' intent to provide a "distinctly civil sanction" for the collection of the additional assessment. *Id.* at 402. In denying Mitchell's double jeopardy claim the Court said that "in the civil enforcement of a remedial sanction there can be no double jeopardy." *Id.* at 404 (footnote omitted).

The Court continued to follow and expand upon this line of reasoning. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), a third party "informer" initiated a

qui tam action on behalf of the government under the False Claims Act, 31 U.S.C. 231-34 (codified as amended at 31 U.S.C. 3730 (1994)), against electrical contractors who had been convicted of defrauding the government through collusive bidding on Public Works Administration projects. The False Claims Act provided for a $2000 per offense civil penalty in addition to double damages. The "informer" won a judgment of $203,000 in double damages and $112,000 as a civil penalty for fifty-six violations of the Act. Under the *qui tam* provisions half the amount recovered would be paid to the government. The Court found that the penalty was remedial because its purpose was to make the government whole. *Id.* at 551-52.

It is Justice Frankfurter's insightful concurring opinion, however, that anticipated the coming debate over double jeopardy. Justice Frankfurter would have rejected the double jeopardy plea on different grounds. *Id.* at 553. He thought that the majority's distinction between punitive and remedial sanctions contained "dialectical subtleties" that are "too subtle" when the issue is "safeguarding the humane interests" that the double jeopardy clause was designed to protect. *Id.* at 554. Justice Frankfurter noted that punitive goals could be sought in civil proceedings and remedial goals in criminal proceedings. He deemed "speculative" a court's judgment whether a forfeiture and double damages constitute an extra penalty or an indemnity for loss. *Id.* If that were the issue, he said, the respondents should be allowed to prove that the penalty and damages were punitive because they exceeded any reasonable calculation of loss to the government. *Id.* This, of course, is exactly what the

Court did some years later in *Halper*, adopting the punitive/remedial test, and remanding for the lower court to determine whether the penalty fairly compensated the government for its costs.

Justice Frankfurter said that double jeopardy does not prevent Congress from authorizing comprehensive penalties, prescribed in advance, to be enforced in separate proceedings. *Id.* at 555. Indeed, he said, such actions were common at the time the Fifth Amendment was written, and "[i]t would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification." *Id.* at 556. *See supra* note 10. Rather, Justice Frankfurter relied on the Eighth Amendment to protect against oppression from cumulative punishments. *Id.*

After *Hess*, and until *Halper*, the Court continued to rely on the reasoning in *Mitchell* for cases that arose in the context of parallel civil and criminal cases. *See Rex Trailer Co. v. United States*, 300 U.S. 148 (1956).

In *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) a jewelry dealer was acquitted of smuggling emeralds and a ring into the country without declaring them. The government then sued to forfeit the jewels. The Court held that double jeopardy did not bar the forfeiture, because Congress intended to order both criminal and civil sanctions. *Id.* at 236-37. In addition, Congress' purpose in authorizing the forfeiture was remedial. *Id.* at 237.

In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), a gun dealer, claiming entrapment, was acquitted of dealing in firearms without a license. He raised double jeopardy as a bar to the subsequent parallel civil forfeiture. The Court analyzed Congressional intent and determined that "only the clearest proof" that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction." *Id.* at 365, quoting *United States v. Ward*, 448 U.S. 242, 249 (1980).

Civil penalties and forfeitures, when intended by Congress, do not fall within the ambit of the Double Jeopardy Clause. To hold otherwise is to overrule all of these cases.

II. THE EXCESSIVE FINES CLAUSE PROVIDES A PRECISE, FAIR, AND EFFECTIVE WAY TO CURB GOVERNMENT OVERREACHING IN THE REALM OF PUNISHMENT.

A. *Halper* And *Austin* Have Unleashed The Speculative, Subjective Analyses Predicted By Justice Frankfurter.

Halper and *Austin* have changed the landscape of Double Jeopardy law. Both cases involved egregious government overreaching. In *Halper* the government sought a civil penalty of $130,000 plus double damages and costs, under the False Claims Act, when the total loss to the government was $585. 490 U.S. at 437. Furthermore the government did not initiate the civil proceeding until the defendant had been sentenced to two years in prison and

fined $5000. *Id.* at 438. *Halper* was a double jeopardy case that should have been an excessive fines case.

Austin sold a small quantity of cocaine to an undercover agent and was sentenced in state court to seven years in prison. The government sought to forfeit his home and auto body shop. The dual sovereignty doctrine barred a double jeopardy claim. Instead, Austin claimed the forfeiture violated the Excessive Fines Clause.

Halper's double jeopardy holding was narrow:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 448-49.

The *Halper* opinion gave assurances that the Court was not opening the door to speculation and result-oriented analyses, as Justice Frankfurter had feared. It restricted its decision to "a rule for the rare case . . . " where a "fixed penalty provision subjects a prolific but small gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449. The Court did not "consider [its] ruling far reaching or disruptive of the Government's need to combat fraud." 490 U.S. at 450.

But there was dicta in *Halper*, reiterated in *Austin*, that lower courts have used to open the door. The dicta in *Halper* said that:

> a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term.

490 U.S. at 448. This dicta can only have been meant to support *Halper's* conclusion that punishment was involved and thus, the multiple punishments prong of double jeopardy analysis applied in that case. If the *Halper* Court had meant that all civil punishment is barred by double jeopardy, it would not have remanded the case for the trial court to determine what part of the penalty was remedial.

The *Halper* Court mandated a case by case, rather than a categorical approach to double jeopardy, by saying that double jeopardy protection is "intrinsically personal," and its violation can only be identified "by assessing the character of the actual sanctions imposed on the individual by the machinery of state." 490 U.S. at 447. In *Kurth Ranch* the Court reiterated and reemphasized this approach. 114 S.Ct. at 1944-46. The categorical approach used by the courts below utterly ignores this important teaching of *Halper*.

The courts below have interpreted *Austin* to require a categorical approach to double jeopardy. The sweeping result of a categorical approach is that where there are parallel civil and criminal proceedings based on the same offense, whichever judgment is entered later is barred by the former, regardless of legislative intent or the remedial nature of the sanction. This cannot be what the Fifth Amendment was meant to protect against.

Thus, in *$405,089.23, supra* the Ninth Circuit found that forfeiture of proceeds following a criminal punishment was barred by double jeopardy, regardless of whether Congress intended multiple punishments and regardless of whether the forfeiture was remedial. Similarly, the Sixth Circuit held in *Ursery, supra*, that any facilitation forfeiture is punishment, and therefore bars a later criminal conviction, regardless of the intent of Congress, and regardless of whether any of the forfeiture was remedial.

The predicament Justice Frankfurter anticipated has arrived, full force. Result-oriented courts can now base any double jeopardy decision they choose on *stare decisis*. They can find that a facilitation forfeiture is remedial and not barred, based on *Halper*, or punitive and barred under *Austin*. *See United States v. Erinkotola*, ___ F. Supp. ___, No. 1995 WL 581240 (N.D.N.Y. Oct. 2, 1995), and *Perez, supra*. They can find that forfeiture of proceeds is remedial, and therefore not barred, or punitive and barred. *See United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 574 (1994), and *$405,089.23, supra*. They can find that a civil and a criminal proceeding are the "same proceeding" under *Halper*, or that they are not. *See United States v. Millan*, 2 F.3d 17 (2nd Cir. 1993), and *$405,089.23, supra*. They can find that a civil forfeiture and crime are the same offense under *United States v. Dixon*, 113 S.Ct. 2849 (1993) or that they are not. *See Ursery, supra*[11] and *Falkowski, supra*.

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[11] The courts below and others that say a civil penalty or forfeiture and a crime are always the same offense apparently find unpersuasive the opinion in *Arizona v. Cook*, 115 S.Ct. 44 (1994), where this Court granted certiorari, vacated, and

This muddle is easily avoided by adopting Justice Frankfurter's reasoning in *Hess*, and applying the Excessive Fines Clause to cases where there is a risk of excessive punishment because of civil remedies authorized by Congress. It controls the problem without overturning this Court's long history of deference to legislative intent.

B. Double Jeopardy Is Too Blunt An Instrument, Both Too Broad And Too Narrow To Apply To Civil Penalties And Forfeitures, But The Excessive Fines Clause Is Both Precise And Fair.

Under the categorical approach adopted by the courts below, when double jeopardy is found the second "punishment" is barred. This can lead to perverse and unjust results. Suppose, for example, a man and a woman live together in a house owned by the man, and together they plant, tend, and distribute from a large marijuana growing operation at his house. If the government charges both suspects criminally and seeks to forfeit the house, the man could stall the criminal case, agree to forfeit his house or settle the civil case, and have the criminal case dismissed based on prior "punishment." The woman, having no property to forfeit, could be sent to prison and fined to the maximum extent allowed by law. This would elevate property rights over liberty interests and is unfair on its face. A defendant's wealth should not be the measure of his or her constitutional protections.

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remanded for reconsideration in light of *Dixon, supra*, an Arizona court opinion that had barred a criminal conviction after imposition of a $150,000 civil penalty for securities fraud.

Under an excessive fines analysis, the total punishment imposed would be the issue. Forfeiture of the house could be partly or completely reversed, but the man would not be treated differently from the woman based simply on his ownership of property.

The Court could accomplish the same result in this hypothetical by returning to *Halper*, and asking whether the forfeiture was remedial. But the question "Was the forfeiture remedial?" is the functional equivalent of "Was there an excessive fine?" This demonstrates that *Halper* was a double jeopardy case that could have been presented to the Court and decided more appropriately as an excessive fines case.

Double jeopardy is also too narrow. It was not available in *Austin*. Nor would it be available where a fine, forfeiture, and prison sentence are imposed in a single proceeding. The Excessive Fines Clause addresses both cases.

Austin paved the way for this approach by holding that the Excessive Fines Clause applies to civil penalties. There the Court remanded for the lower courts to develop guidelines for excessiveness. The lower courts are doing so. *See e.g., United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1995), *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995), *United States v. Alexander*, 32 F.3d 1231 (8th Cir. 1994), *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994). Using the excessive fines clause is fair, and does not merely protect the propertied from criminal prosecution.

CONCLUSION

This Court has its first clear opportunity in decades to address all of the issues surrounding double jeopardy in the context of parallel civil and criminal cases. The Court should rely on Justice Frankfurter's well-reasoned concurring opinion in the *Hess* case, which is consistent with the Court's history of deferring to congressional authority to determine what and how many penalties to impose for particular conduct. The Excessive Fines Clause provides the fairest and most effective way to curb government overreaching that the Court was concerned about in *Halper*, *Austin*, and *Kurth Ranch*. For all of the reasons discussed above, the Court should reverse the decisions of the Ninth and Sixth Circuits.

Respectfully Submitted,

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